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Digital Deception: The Undue Influence Enhancement in the Sentencing of Cyber-Predators Caught in Online Sting Operations

MacKenzie Fallow¹

I. Introduction

Kacie Woody of Faulkner County, Arkansas was twelve years old the summer of 2002.² That's when Kacie met a boy in an Internet chat room for Christian teenagers.³ The boy said his name was Dave Fagen.⁴ Dave's online profile indicated he was eighteen and from San Diego, California.⁵ Dave and Kacie soon discovered they had something in common: they both had family members who had been involved in terrible car accidents.⁶ Kacie's mother died in a car accident when she was seven years old.⁷ Dave's aunt had recently been in a car accident and was in a coma.⁸ Kacie and Dave chatted online by an instant messaging program for months.⁹ They even talked on the phone numerous times.¹⁰

Dave lived in California, but he was not eighteen.¹¹ His name was David Fuller, and he was forty-seven years old.¹² He was married with two kids.¹³ Fuller did not have an aunt in a

¹ J.D. Candidate, University of North Carolina School of Law, 2005.

² Cathy Frye, *Caught in the Web, Second of Four Parts: Entryway to Danger*, ARK. DEMOCRAT-GAZETTE, Dec. 15, 2003, at 1.

³ Cathy Frye, *Caught in the Web, First of Four Parts: Evil at the Door*, ARK. DEMOCRAT-GAZETTE, Dec. 14, 2003, at 1.

⁴ See Cathy Frye, *Caught in the Web, Third of Four Parts: Running Out of Time*, ARKANSAS DEMOCRAT-GAZETTE, Dec. 16, 2003, at 1.

⁵ Frye, *supra* note 3.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Frye, *supra* note 4.

¹² *Id.*

¹³ See *id.*

coma.¹⁴ Police believe he made up that story to gain Kacie's trust.¹⁵ Fuller flew from California to Arkansas on October 11, 2002, and again on November 4, 2002.¹⁶ On one of these trips he rented a storage unit.¹⁷ Police also believe Fuller spied on Kacie during these trips.¹⁸ He may have seen Kacie crowned seventh grade queen at her school's fall festival during one weekend he was in town.¹⁹

On December 3, 2002, Kacie was chatting online with another Internet friend named Scott.²⁰ At 9:41 pm, Kacie abruptly stopped responding to Scott's instant messages.²¹ Scott became concerned.²² When Kacie's brother got home around 11:30 pm, he could not find Kacie and the police were called.²³ The next day, the police found Fuller and Kacie in a van in the locked storage unit Fuller rented weeks before.²⁴ Fuller had raped and killed Kacie.²⁵ Fuller shot himself just as law enforcement prepared to apprehend him.²⁶ Kacie was thirteen years old when she was killed.²⁷

Kacie's story demonstrates how easy it is to meet and mislead children on the Internet. According to a study by the National Center for Education Statistics, fifty-nine percent of children ages five to seventeen use the Internet.²⁸ Close to eighty

¹⁴ See Cathy Frye, *Caught in the Web, Last of Four Parts: But Not Forgotten*, ARK. DEMOCRAT-GAZETTE, Dec. 17, 2003, at 1.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See *id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Frye, *supra* note 3.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Frye, *supra* note 14.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Rachel Davis, *Kids Rule in World of Computers*, FLORIDA TIMES-UNION (Jacksonville), Dec. 4, 2003, at A-1; MATTHEW DEBELL & CHRIS CHAPMAN, NATIONAL CENTER FOR EDUCATION STATISTICS, COMPUTER AND INTERNET USE BY CHILDREN AND ADOLESCENTS IN 2001 4 (2003), <http://nces.ed.gov/>

percent of teens use the Internet.²⁹ A Nielsen survey estimated twenty-seven million American children ages two to seventeen used the Internet from home during September 2003.³⁰ The same anonymity that enables cyber-predators to communicate easily with children, however, also allows law enforcement to catch some criminals. Indeed, law enforcement officers have found that by using digital deception—entering chat rooms under the assumed identities of teens and pre-teens—they are better able to investigate and catch cyber-predators.³¹

When cyber-predators are caught through online sting operations and found guilty of the underlying statutory violation,³² judges must look to the United States Sentencing Guidelines (“Sentencing Guidelines”) to determine what sentences offenders will serve.³³ One of the sentencing guidelines applicable to such cases is section 2A3.2, “Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts.”³⁴ Section 2A3.2 is intended to apply to consensual acts between the defendant and the victim which are illegal due to

pubsearch/pubsinfo.asp?pubid=2004014 (last visited Apr. 1, 2004) (on file with the North Carolina Journal of Law & Technology).

²⁹ *Id.*

³⁰ Dan Horn, *Kids Here Near Top in Using Internet*, THE CINCINNATI ENQUIRER, Oct. 23, 2003, at 1A; Press Release, Nielsen/NetRatings, Kids Account for One Out of Five Internet Surfers in the U.S. (Oct. 21, 2003), http://www.nielsen-netratings.com/pr/pr_031021_us.pdf (on file with the North Carolina Journal of Law & Technology).

³¹ See Michael Schrage, *We Can Trap More Crooks With a Net Full of Honey*, WASH. POST, Jan. 11, 2004, at B01.

³² 18 U.S.C. § 2422(b) (2003) (prohibiting persuading or attempting to persuade a minor to engage in criminal sexual activity); *Id.* § 2423(b) (prohibiting traveling or attempted interstate travel for the purposes of engaging in criminal sexual acts with a minor).

³³ 18 U.S.C. § 3553. The Sentencing Guidelines are not suggestions for judges; they must be followed. *Id.* The Sentencing Guidelines assign each crime a base offense level. U.S. Sentencing Guidelines § 2 (2002) [hereinafter U.S.S.G.]. The base offense level can be increased or decreased based on specific offense characteristics. *Id.* § 1(B). The amended offense level, along with the defendant’s criminal history, determines the defendant’s sentence. See *id.*

§ 5(A).

³⁴ U.S.S.G. § 2A3.2.

the victim's age.³⁵

Section 2A3.2 includes a provision allowing for a sentencing increase, or "enhancement," when the offender "unduly influenced the victim."³⁶ Section 2A3.2 specifically defines "victim" to include "undercover law enforcement officer."³⁷ However, whether an online offender can "unduly influence" an undercover law enforcement officer remains unsettled. In 2002, in *United States v. Root*,³⁸ the Court of Appeals for the Eleventh Circuit said an online offender can "unduly influence" an undercover law enforcement agent because of the specific inclusion of undercover officers in the definition of "victim." In 2003, in *United States v. Mitchell*,³⁹ the Court of Appeals for the Seventh Circuit said an online offender cannot "unduly influence" an undercover officer because the language of the guideline requires sexual contact to occur before it can be applied. As law enforcement agencies are increasingly engaging in online sting operations to catch cyber-predators,⁴⁰ the ambiguity of the guideline will continue to cause judicial confusion.

Section 2A3.2 itself does not answer that question. Even though one of the primary goals of the Sentencing Guidelines is to eliminate sentencing disparity,⁴¹ imprecise and ambiguous guidelines like section 2A3.2 allow for disparate interpretations. Section 2A3.2 does not define "undue influence." Specifically, section 2A3.2 does not indicate whether the offender need only exert undue influence, in which case the guideline is punishing the offender based on his culpability, or if the victim must actually

³⁵ Sentencing Guidelines for the U.S. Courts, 60 Fed. Reg. 7080-01 (Feb. 11, 2000).

³⁶ U.S.S.G. § 2A3.2(b)(2)(B).

³⁷ *Id.* § 2A3.2, cmt. n.1.

³⁸ 296 F.3d 1222, 1234 (11th Cir. 2002).

³⁹ 353 F.3d 552, 554 (7th Cir. 2003).

⁴⁰ Schrage, *supra* note 31, at B01 (explaining that the United States, Britain, and Australia recently began a "global law enforcement initiative" called Operation Pin: "It uses fake sites and chat rooms to crack down on adults who seek to purchase child pornography online or to use the Internet to make inappropriate contact with the underaged Operation Pin is intended to deter as well as entrap." *Id.*).

⁴¹ U.S.S.G., ch. 1, pt. A (1987) (most recently amended 2003).

experience and succumb to the offender's influence, which would mean that the guideline is punishing the offender based on actual harm caused. To resolve the ambiguity it is necessary to determine who section 2A3.2 is intended to punish—the offender with wrongful intent or the offender who actually caused harm.

This Comment explores the ambiguities of section 2A3.2 and analyzes the decisions in *Root* and *Mitchell*. Part II discusses the *Root* holding that an undercover law enforcement officer *can* be “unduly influenced” and the *Mitchell* holding that an undercover law enforcement officer *cannot* be “unduly influenced.” Part III analyzes subsection 2A3.2(b)(2)(B) in the context of section 2A3.2 and compares it to section 2G1.1, a sentencing guideline with similar language. Part III then examines the legislation that led to the creation of section 2A3.2. This paper concludes that an online offender can unduly influence an undercover law enforcement officer for purposes of this guideline, but the *Root* court reached this conclusion without a thorough analysis. Part IV suggests amendments to section 2A3.2 that would enable courts to apply the enhancement consistently, in accordance with one of the goals of the Sentencing Guidelines.

II. Two Interpretations of Subsection 2A3.2(b)(2)(B)

Subsection 2A3.2(b)(2)(B) increases a defendant's offense level when “a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct.”⁴² “Victim” is defined in section 2A3.2 as “(A) an individual who, except as provided in subdivision (B), had not attained the age of 16 years; or (B) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.”⁴³ The application notes include a directive to “closely consider the facts of the case to determine whether a participant's influence over the victim compromised the voluntariness of the victim's behavior.”⁴⁴ The Eleventh and Seventh Circuits have reached conflicting conclusions about

⁴² *Id.* § 2A3.2(b)(2)(B).

⁴³ *Id.* § 2A3.2, cmt. n.1.

⁴⁴ *Id.* § 2A3.2, cmt. n.4.

whether subsection 2A3.2(b)(2)(B) can apply when the “victim” is an undercover law enforcement officer.

The issue is whether the courts define “influence” in subsection 2A3.2(b)(2)(B) from the perspective of a victim or a defendant. If it is victim-focused, application of the enhancement will depend on actual harm experienced by the victim. If it is defendant-focused, application of the enhancement will depend on the intent and actions, or culpability, of the defendant. Analysis of the word “victim” and the phrase “unduly influenced” as used in subsection 2A3.2(b)(2)(B) will be helpful in determining the focus of this enhancement. Where the “victim” can be a law enforcement officer, the enhancement must be defendant-focused because the “victim” will never be harmed. On the other hand, if the words “unduly influenced” are interpreted to require the victim to actually do what the defendant wants, the enhancement is victim-focused because its application depends on whether the victim succumbed to the defendant’s influence. The meaning of these words is intertwined: both provide clues about the purpose of the enhancement.

A. United States v. Root

1. Summary of the Decision

In *United States v. Root*,⁴⁵ the defendant struck up an online conversation with an undercover law enforcement officer posing as a thirteen-year-old girl named Jenny.⁴⁶ Over three days, the defendant chatted with “Jenny” several times, talking to her about sex and explaining various sexual terms.⁴⁷ The defendant traveled from North Carolina to Georgia to meet “Jenny,” where he was arrested.⁴⁸ He was convicted of attempting to persuade a minor to engage in criminal sexual activity and interstate travel for the

⁴⁵ 296 F.3d 1222 (11th Cir. 2002).

⁴⁶ *Id.* at 1224.

⁴⁷ *Id.*

⁴⁸ *Id.*

purpose of engaging in a criminal sexual act with a minor.⁴⁹ The defendant's offense level for purposes of sentencing was increased under subsection 2A3.2(b)(2)(B).⁵⁰

The Eleventh Circuit gave two primary reasons for holding that an offender can unduly influence a law enforcement officer under subsection 2A3.2(b)(2)(B). First, the court pointed to the specific inclusion of "undercover law enforcement officer" in the definition of "victim."⁵¹ The court noted the Sentencing Commission's statement that the definition was expanded to ensure that offenders arrested as a result of undercover operations are appropriately punished.⁵² The court determined that it would be illogical to allow "victim" to mean "undercover law enforcement officer" and then require that the offender actually overcome the officer's will.⁵³

Second, the court decided that subsection 2A3.2(b)(2)(B) focuses on the offender's conduct, not the victim's response to or feelings about the offender's conduct.⁵⁴ The court came to this conclusion because section 2A3.2 specifically applies to violations of statutes that prohibit mere attempts of criminal activity.⁵⁵ Because section 2A3.2 specifically applies to defendants who are convicted of attempt crimes, the court determined that a finding of actual sexual abuse was not required for the enhanced sentencing penalties to apply.⁵⁶ If actual sexual abuse is not required, the court reasoned that the sentencing guideline must focus on the offender's culpability rather than actual harm caused to the

⁴⁹ *Id.* at 1226–27.

⁵⁰ *Id.* at 1227.

⁵¹ *Id.* at 1233.

⁵² *Id.* at 1234. The Commission made the amendment to "clarify[] that 'victim' includes an undercover police officer who represents to the perpetrator of the offense that the officer was under the age of 16 years. This change was made to ensure that offenders who are apprehended in an undercover operation are appropriately punished." U.S.S.G. app. C, at 49 (2002).

⁵³ *Root*, 296 F.3d at 1234.

⁵⁴ *Id.*

⁵⁵ Section 2A3.2 applies to violations of 18 U.S.C. § 2423(b), which is "an offense requiring a non-sexual action such as travel with a specific intent to commit a sex crime." *Id.*

⁵⁶ *Id.*

victim.⁵⁷

To find that the defendant acted to unduly influence the victim, the *Root* court looked at the defendant's behavior.⁵⁸ The court found that Root used three types of power in his actions to unduly influence the victim: increased knowledge, persuasive power, and superior resources.⁵⁹ By explaining sexual acts and terms to the victim, Root used increased knowledge to influence the victim to have sex with him.⁶⁰ By telling the victim that other thirteen-year-old girls engage in these acts and that he would be "gentle" with her, Root used persuasive powers to influence the victim to have sex with him.⁶¹ By offering to pay for the victim to see a movie and offering the victim the use of his car and compact discs, Root used superior resources to influence the victim to have sex with him.⁶² The court concluded these actions were sufficient to find Root unduly influenced the victim.⁶³

2. Weaknesses of the Decision

Section 2A3.2 includes a comment from the Sentencing Commission to "consider the facts of the case to determine whether a participant's influence over the victim compromised the voluntariness of the victim's behavior."⁶⁴ This directive conflicts with the definition of "victim" provided in the sentencing guideline. While the *Root* court briefly mentioned this directive from the Sentencing Commission,⁶⁵ it failed to explain either how

⁵⁷ *Id.*

⁵⁸ *Id.* at 1235. Root thought he was talking to a thirteen-year-old girl named Jenny. *Id.* at 1224. In reality, "Jenny" was an investigator with a sheriff's department in Georgia. *Id.*

⁵⁹ *Id.* at 1235–36.

⁶⁰ *Id.* at 1235 (explaining that Root described "masturbation, ejaculation, orgasms, cunnilingus, fellatio, manual penetration and sexual intercourse" to Jenny).

⁶¹ *Id.* at 1235–36. Root told Jenny "that touching a man's genitalia 'gives you power.'" *Id.* at 1225.

⁶² *Id.* at 1236.

⁶³ *Id.* at 1235.

⁶⁴ U.S.S.G. § 2A3.2, cmt. n.4 (2002).

⁶⁵ *Root*, 296 F.3d at 1232–33.

this directive fits into its interpretation of the guideline or why this directive does not lead to another outcome. This directive suggests that the guideline is victim-focused because it specifically instructs the court to look at how the offender's conduct has affected the victim. The court could have explained why it did not find this statement persuasive, but it failed to do so.

B. *United States v. Mitchell*

1. Summary of the Decision

In *United States v. Mitchell*,⁶⁶ the Seventh Circuit interpreted the same sentencing guideline but came to a different conclusion than the *Root* court. The defendant in *Mitchell*, who was fifty years old, communicated online with an undercover law enforcement officer posing as a fourteen-year-old girl named Dena.⁶⁷ The defendant explained many sexual terms and acts to "Dena."⁶⁸ He was arrested after he traveled from Indiana to Illinois to meet "Dena."⁶⁹ The defendant pled guilty to interstate travel for the purpose of engaging in a criminal sexual act.⁷⁰

The *Mitchell* court found that the "plain language" of subsection 2A3.2(b)(2)(B) does not allow enhancement where the "victim" is an undercover law enforcement officer.⁷¹ In fact, the court went even further, concluding that the undue influence enhancement does not apply at all to attempt crimes.⁷² "[T]he enhancement cannot apply where the offender and victim have not engaged in illicit sexual conduct."⁷³ The court based this conclusion on the fact that the Sentencing Commission wrote the guideline in the past tense which the court interpreted as requiring the defendant to succeed in his attempt to influence the victim.⁷⁴

⁶⁶ 353 F.3d 552 (7th Cir. 2003).

⁶⁷ *Id.* at 553–54.

⁶⁸ *Id.* at 554.

⁶⁹ *Id.* at 553–54.

⁷⁰ *Id.* at 555.

⁷¹ *Id.* at 554.

⁷² *Id.* at 557.

⁷³ *Id.*

⁷⁴ *Id.* at 556.

Consequently, the court reasoned that the enhancement could not apply to cases where the victim is not actually convinced to engage in sexual relations.⁷⁵

The court then listed several definitions of “undue influence” from a variety of sources, finding that civil case law, a contracts treatise, and American Jurisprudence 2d each require that the influencer succeed in altering the behavior of the target.⁷⁶ The court analyzed the word “influence” and the phrase “undue influence” by looking to their definitions in the Oxford English Dictionary and Black’s Law Dictionary, respectively.⁷⁷ Based on these readings and definitions, the court concluded that “there can be no influence where the object of the influence has not acted accordingly.”⁷⁸

The court concluded that the guideline is focused on the behavior of the victim because of the application note instructing courts to consider whether the offender’s influence of the victim compromised the voluntariness of the victim’s behavior.⁷⁹ The court noted that the victims in online sting operations “are created and manipulated by the police.”⁸⁰ Because the court found the enhancement to be victim-focused, the court concluded that the enhancement cannot apply in these cases where the age, characteristics, and actions of the victim are decided by law enforcement.⁸¹

The court criticized *Root* as ignoring the plain meaning of the guideline and the corresponding commentary.⁸² The court acknowledged that the guideline defines “victim” to include “law

⁷⁵ *Id.*

⁷⁶ *Id.* at 557–58.

⁷⁷ *Id.* at 558. “The Oxford English Dictionary defines influence as ‘to affect the mind or action of; to move or induce by influence; sometimes especially to move by improper or undue influence’ Oxford English Dictionary (2d ed. 1989).” *Id.* “Black’s Law Dictionary contains several paragraphs on ‘undue influence’ each of which defines the term, in part, based on the effect of the influence on the target.” *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 557.

⁸⁰ *Id.* at 561.

⁸¹ *Id.*

⁸² *Id.* at 561–62.

enforcement officer,” but stated that the wording of the guideline still requires that the victim be unduly influenced, which requires that the prohibited sexual conduct actually occur.⁸³

2. Weaknesses of the Decision

The *Mitchell* court claimed that the “plain language” of section 2A3.2 supports its holding, but this does not appear to be true. The court relies on the past tense language of subsection 2A3.2(b)(2)(B), concluding that this requires the influencer to have convinced the victim to engage in a sex act.⁸⁴ Yet, as the dissent points out, the past tense language could just as easily “mean that the influence lies in the past,” not that the “sexual relations occurred in the past.”⁸⁵ Even if the use of past tense does require the act to have been completed, the act here is the influence, not the sexual contact.

The *Mitchell* court seemed to be concerned with law enforcement’s ability to manipulate the victim’s characteristics so that subsection 2A3.2(b)(2)(B) would always apply in online sting operations.⁸⁶ But even if the enhancement is found to be victim-focused, it is still the offender’s behavior, not the victim’s characteristics, which would be relevant in the application of the enhancement. The enhancement would not apply to mere solicitations, where the offender did not take extra steps to convince the victim to engage in sexual activity. The enhancement would apply, however, where the offender went beyond solicitation and attempted to convince or persuade the victim to engage in sexual activity.

The court also placed great weight on the use of the phrase “undue influence” in the civil law context, which requires that the influencer accomplish his goal.⁸⁷ However, incorporating this civil law requirement into criminal law provisions is risky as it could eliminate attempt liability altogether. Civil law requires the

⁸³ *Id.* at 559.

⁸⁴ *Id.* at 557.

⁸⁵ *Id.* at 564 (Easterbrook, J., dissenting).

⁸⁶ *Id.* at 561.

⁸⁷ *Id.* at 557–58.

influencer to be successful in influencing a victim because if he is not, there is no injury and can be no damages. Civil law is centered on the concept of damages and making an injured person whole.⁸⁸ But section 2A3.2 is a criminal law provision, and criminal law punishes attempts.⁸⁹ In fact, the criminal statute violated in *Root* and *Mitchell*, to which section 2A3.2 applies, specifically punishes attempt violations as well as actual violations.⁹⁰ “[C]riminal law is distinguished by its punitive purposes . . . [and] its concern with the blameworthiness of the defendant In contrast, the civil law is defined as a compensatory scheme, focusing on damage rather than on blameworthiness.”⁹¹ Thus, requiring the offender to have succeeded in completing a sex act with the victim eliminates the essential distinction between civil and criminal law.

Once we strip away what civil common law has added to the words “unduly influenced,” we can do what the *Mitchell* court claims to have done: look at the plain language of the guideline. “Undue” means “more than necessary; not proper; illegal.”⁹² “Influence” means “power exerted over others. To affect, modify or act upon by physical, mental or moral power, especially in some gentle, subtle, and gradual way.”⁹³ “Undue influence” *can* mean what the *Mitchell* court held it to mean. However, the word “or” in the definition of “influence” indicates “undue influence” can also mean improper or illegal acts that do not necessarily affect or modify the subject. Further analysis is necessary to determine which meaning was intended in section 2A3.2.

III. Analysis

After analyzing subsection 2A3.2(b)(2)(B) in context and

⁸⁸ See Paul H. Robinson, *Symposium: The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206 (1996).

⁸⁹ Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 477, 479 (2004).

⁹⁰ 18 U.S.C. § 2423(b) (2003).

⁹¹ Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1799 (1992).

⁹² BLACK'S LAW DICTIONARY 1528 (6th ed. 1990).

⁹³ *Id.* at 779.

in light of its legislative history, this paper concludes that the Sentencing Commission and Congress intended subsection 2A3.2(b)(2)(B) to apply when the “victim” is an undercover law enforcement officer. Under this interpretation, the offender will receive a harsher sentence due to his culpability. The intent of Congress and the Commission in amending this guideline was to punish offender culpability, and this construction best accomplishes that intent.⁹⁴ The enhancement will not apply to truly consensual acts between a defendant and a victim, where the victim was completely willing from the very beginning. It will apply, however, where the defendant influences or attempts to influence a victim to engage in prohibited sexual acts.

A. Ambiguity

The ambiguity of section 2A3.2 has caused the Seventh and Eleventh circuits to split on this issue. Ambiguity exists in language “if reasonable minds could differ as to its meaning.”⁹⁵ Both the *Root* court and the *Mitchell* court’s interpretations are

⁹⁴ While the Sentencing Commission and Congress intended for subsection 2A3.2(b)(2)(B) to apply when the victim is a law enforcement officer, that does not necessarily mean that it should apply when the victim is a law enforcement officer. In almost all cases where this enhancement is applied and the victim is an undercover law enforcement officer, another enhancement will also apply: “If a computer or an Internet-access device was used to persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct . . . increase by two levels.” U.S.S.G. § 2A3.2(b)(3) (2002). If both provisions will almost always apply to these sting operations, it may appear to be double counting, which is not permitted. Double counting “occurs when the same conduct on the part of the defendant is used to support separate increases under separate enhancement provisions which necessarily overlap, are indistinct, and serve identical purposes.” *United States v. Fisher*, 132 F.3d 1327, 1329 (10th Cir. 1997). Applying the computer enhancement and the undue influence enhancement will not constitute double counting under this definition. While there will be some overlap in applying both of these provisions, the same conduct is not being punished by both enhancements. Use of a computer and undue influence are two different actions, being punished by two different enhancements. The enhancements serve different purposes, to deter use of a computer to meet children and to deter the exertion of undue influence.

⁹⁵ 73 AM. JUR. 2D *Statutes* § 114 (2001) (citing *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W. 2d 729 (Wis. 1997)).

reasonable. On one hand, section 2A3.2 does specifically state that “victim” can be an undercover law enforcement officer.⁹⁶ On the other hand, section 2A3.2 also requires consideration of whether the voluntariness of the victim’s behavior was compromised.⁹⁷ Because reasonable minds can differ as to the meaning of this guideline, it is ambiguous.

When words are ambiguous courts often look for contextual clues and legislative intent to resolve the ambiguity.⁹⁸ Because subsection 2A3.2(b)(2)(B) is ambiguous as to who can be a victim, the courts should have looked to its context, including similar guidelines for comparison, and to the intent of Congress and the Commission in promulgating the guideline. Looking at context and legislative intent can help courts apply this guideline properly and resolve the ambiguity.

B. Context

As Judge Learned Hand wrote, “There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure.”⁹⁹ Most words have more than one meaning;¹⁰⁰ context helps us determine which particular meaning is intended.¹⁰¹

1. “Victim” in Other Parts of § 2A3.2

Structurally, section 2A3.2 has numerous problems, some

⁹⁶ U.S.S.G. § 2A3.2, cmt. n.1.

⁹⁷ *Id.* § 2A3.2, cmt. n.4.

⁹⁸ See *Microsoft Corp. v. Comm’r*, 311 F.3d 1178, 1184 (2002) (stating that when words are ambiguous, context clarifies which meaning was intended); *Smith v. Doe*, 538 U.S. 84 (2003) (analyzing legislative intent in a sex offender registration statute).

⁹⁹ *Cent. Hanover Bank & Trust Co. v. Comm’r*, 159 F.2d 167, 169 (2d Cir. 1947).

¹⁰⁰ *Ctr. for Blood Research, Inc. v. Coregis Ins. Co.*, 305 F.3d 38, 41 (1st Cir. 2002).

¹⁰¹ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 466 (1st Cir. 2001).

of which neither *Root* nor *Mitchell* addresses. The guideline uses the word “victim” eight times.¹⁰² The word “minor” is found only in the title.¹⁰³ Although the commentary defines “victim” to include law enforcement officers,¹⁰⁴ not every provision that uses the word “victim” can be applied when the victim is a law enforcement officer. Two provisions, subsections 2A3.2(b)(1) and 2A3.2(c), illustrate why it would be illogical to allow “victim” to mean “law enforcement officer” every time it is used.

Subsection 2A3.2(b)(1) increases the sentence “[i]f the victim was in the custody, care, or supervisory control of the defendant.”¹⁰⁵ How could this happen when the “victim” is a law enforcement officer? Even if there were an undercover law enforcement officer who actually looks young enough to convince an offender that he/she is under sixteen years old, the offender would never have custody or supervisory control of the officer. In spite of the fact that the guideline defines “victim” to include law enforcement and this provision uses the word “victim,” this enhancement can never apply when the “victim” is an undercover law enforcement officer.

Another provision, subsection 2A3.2(c), instructs judges to apply a different sentencing guideline, section 2A3.1, “if the victim had not attained the age of 12 years.”¹⁰⁶ There are two reasons subsection 2A3.2(c) cannot be used when the “victim” is a law enforcement officer. First, there are no law enforcement officers under age twelve. Second, even if the age of the fictitious victim, who could be under the age of twelve, were applied, section 2A3.1 does not contain a similar definition of “victim” to include law enforcement officers. The absence of such a definition when it is present elsewhere indicates the Sentencing Commission did not intend for section 2A3.1 to apply unless an actual minor is involved. This means the word “victim” in subsection 2A3.2(c), which cross-references section 2A3.1, cannot be interpreted to

¹⁰² U.S.S.G. § 2A3.2 (2002).

¹⁰³ *Id.* The guideline is titled, “Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts.”

¹⁰⁴ *Id.* § 2A3.2, cmt. n.1.

¹⁰⁵ *Id.* § 2A3.2(b)(1).

¹⁰⁶ *Id.* § 2A3.2(c).

include undercover law enforcement officers.

These two examples illustrate that it would be illogical to allow every use of the word “victim” in section 2A3.2 to include law enforcement officers.¹⁰⁷ Thus, reliance on the guideline’s general definition of “victim” is not enough to find that any particular use of the word “victim” can include undercover law enforcement officers. Additional analysis is needed to determine whether the word “victim” in subsection 2A3.2(b)(2)(B) should include undercover law enforcement officers. A comparison to another guideline that similarly defines “victim” to include law enforcement officers and an understanding of legislative intent provide additional information.

2. Other Sentencing Guidelines: U.S.S.G. Section 2G1.1

Because “language ‘cannot be sequestered from its surroundings,’”¹⁰⁸ the use of the word “victim” in other parts of the Sentencing Guidelines is also relevant because it provides additional information about the Commission’s understanding of the word. In particular, section 2G1.1, “Promoting A Commercial Sex Act or Prohibited Sexual Conduct,” also defines “victim” to

¹⁰⁷ This reasoning may help resolve another conflict between *Root* and *Mitchell*, which involved the rebuttable presumption note about subsection 2A3.2(b)(2)(B). The application note provides a rebuttable presumption of “undue influence” where the offender is ten years older than the victim. U.S.S.G. § 2A3.2 cmt. n. 4. The *Root* Court applied this presumption, using the age of the fictitious child as opposed to the officer to find a ten-year difference. *United States v. Root*, 296 F.3d 1222, 1234–36 (11th Cir. 2002). The *Mitchell* Court rejected this interpretation, finding it would allow the presumption to apply in every case because the police will make sure the fictitious child is at least ten years younger than the offender. *United States v. Mitchell*, 353 F.3d 552, 560–61 (7th Cir. 2003). Defining “victim” to mean law enforcement officer in some provisions but not in others will allow courts to apply the undue influence enhancement without applying the presumption. Just because “victim” can mean law enforcement officer in subsection 2A3.2(b)(2)(B) does not mean that “victim” has to mean law enforcement officer in the rebuttable presumption provision.

¹⁰⁸ *Gilday v. Callahan*, 59 F.3d 257, 263 (1st Cir. 1995) (quoting *Victor v. Nebraska*, 511 U.S. 1, 16 (1994)).

include "undercover law enforcement officer."¹⁰⁹ Section 2G1.1 applies to several crimes involving prostitution.¹¹⁰ Section 2G1.1 contains many provisions similar to section 2A3.2.¹¹¹ The complete definition of "victim" in section 2G1.1 is

a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.¹¹²

This definition of "victim" in section 2G1.1 is the most persuasive evidence that the Commission intended subsection 2A3.2(b)(2)(B) to apply when the "victim" is an undercover law enforcement officer. This definition of "victim" leaves no doubt that the Sentencing Commission believes an undercover law enforcement officer may be "persuaded, induced, enticed, or coerced." If a law enforcement officer can be "persuaded, induced, enticed, or coerced," there is no reason why he/she could not be "unduly influenced."

The word "induce" in section 2G1.1's definition of "victim" is especially noteworthy. Induce means "to bring on or about, to affect, cause, *to influence* to an act or course of conduct."¹¹³ "Induce," even more so than "influence," seems to require the act to have actually occurred. Yet section 2G1.1 definitively shows that the Sentencing Commission believes a law enforcement officer may be "induced."¹¹⁴ It may be that the Sentencing Commission used these words incorrectly, but this nevertheless demonstrates that the Sentencing Commission intended to focus on the *act* of the offender and not the act's *effect* on the victim.

Section 2G1.1 also demonstrates the Sentencing

¹⁰⁹ U.S.S.G. § 2G1.1 cmt. n.1.

¹¹⁰ *Id.* § 2G1.1 cmt.

¹¹¹ *See id.* § 2G1.1.

¹¹² *See id.* § 2G1.1 cmt. n.1.

¹¹³ BLACK'S LAW DICTIONARY 775 (6th ed. 1990) (emphasis added).

¹¹⁴ *See* U.S.S.G. § 2G1.1 cmt. n.1.

Commission's ability to make distinctions between victims who can be law enforcement officers and victims who must be actual minors.¹¹⁵ Section 2G1.1 not only has a definition of "victim" as described above, but it also includes a definition of "minor."¹¹⁶ Under section 2G1.1, a minor is "an individual who had not attained the age of 18 years."¹¹⁷ Section 2G1.1 uses the word "minor" in some provisions¹¹⁸ and "victim" in others.¹¹⁹ This differentiation between "minor" and "victim" in section 2G1.1 demonstrates that if the Sentencing Commission intended to specifically exclude law enforcement officers from 2A3.2(b)(2)(B), it knew how to do so.

C. Legislative Intent

Prior to 2000, section 2A3.2 did not provide for any enhancement for unduly influencing the victim and did not mention undercover law enforcement officers.¹²⁰ In 1998, Congress passed the Protection of Children from Sexual Predators Act (the Act).¹²¹ The Act amended various provisions of title 18 of the United States Code, including the provision that prohibits interstate travel for the purposes of engaging in criminal sex with a minor.¹²² The Act instructed the Sentencing Commission to increase sentences for violations of that provision.¹²³ Section

¹¹⁵ While it is clear from section 2G1.1 that the Commission knows how to make such a distinction, it is less clear that the Commission knows how to use the distinction properly to clarify the guidelines. That, however, is the subject for another paper.

¹¹⁶ U.S.S.G. § 2G1.1 cmt. n.1.

¹¹⁷ *Id.*

¹¹⁸ *E.g., id.* §§ 2G1.1(a)(1), 2G1.1(b)(4)(A), 2G1.1(b)(4)(B), 2G1.1(b)(5).

¹¹⁹ *E.g., id.* §§ 2G1.1(b)(2), 2G1.1(b)(3)(A), 2G1.1(b)(3)(B).

¹²⁰ The 1987 version of section 2A3.2 read, in its entirety: "Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts (a) Base Offense Level: 15(b) Specific Offense Characteristic (1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 1 level."

¹²¹ Protection of Children from Sexual Predators Act of 1998. Pub. L. No. 105-314, 112 Stat. § 2974 (codified as amended in scattered sections 18 U.S.C.).

¹²² *Id.*

¹²³ *Id.* Interstate travel to have criminal sex with a minor is prohibited by 18 U.S.C. § 2423(b) (2003). Both Root and Mitchell were convicted under

2A3.2 is the sentencing guideline applicable to this violation¹²⁴ and was amended to its current form as a result of this Act.¹²⁵

Congress enacted this legislation primarily in response to cyber-predator use of the Internet to meet minors.¹²⁶ The legislative history is filled with references to adults meeting children online and then sexually abusing and/or murdering them.¹²⁷ The House noted, “‘Cyber-predators’ often ‘cruise’ the Internet in search of lonely, rebellious, or trusting young people.”¹²⁸ The House also was concerned that

the recidivism rates for [child sex] offenders are 10 times higher than other types of criminal offenders. . . . Law enforcement urged Congress to provide them with the tools necessary to investigate and bring to justice those individuals who prey on our nation’s children. . . . Those who commit these heinous crimes must be sent a message that they will be punished swiftly and severely. [The Protection of Children from Sexual Predators Act] intends to do just that.¹²⁹

The House version of the Act contained an amendment that would have made illegal “travels in interstate commerce . . . for the purpose of engaging in any sexual activity, with another person who has not attained the age of 18 years *or who has been represented to the traveler or conspirator as not having attained the age of 18 years.*”¹³⁰ The Senate specifically rejected this amendment.¹³¹ It found that the purpose of the House’s proposed

§ 2423(b). *United States v. Root*, 296 F.3d 1222, 1226–27 (11th Cir. 2002); *United States v. Mitchell*, 353 F.3d 552, 555 (7th Cir. 2003). Section 2A3.2 is the sentencing guideline applicable to violations of 18 U.S.C. § 2423(b) (2003).

¹²⁴ U.S.S.G. § 2A3.2(a).

¹²⁵ *Id.* app. C, amend. 592.

¹²⁶ 144 CONG. REC. 12,257 (1998).

¹²⁷ *See id.*; 144 CONG. REC. 10,566 (1998); H.R. REP. 105-557 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678.

¹²⁸ H.R. REP. NO. 105-557, at 11–12 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 680.

¹²⁹ *Id.* at 12.

¹³⁰ H.R. 3494, 105th Cong. § 202 (1998) (emphasis added).

¹³¹ 144 CONG. REC. 12,257 (statement of Sen. Leahy).

amendment was “to make clear that the targets of sting operations are not relieved of criminal liability merely because their intended victim turned out to be an undercover agent and not a child.”¹³²

The Senate thought this amendment was unnecessary, stating:

The new “sting” provisions addressed a problem that simply does not currently exist: no court has ever endorsed an impossibility defense along the lines anticipated by the House bill. The creation of a special “sting” provision in this one area could unintentionally harm law enforcement interests by lending credence to impossibility defenses raised in other sting and undercover situations.¹³³

Yet the *Mitchell* court’s refusal to apply subsection 2A3.2(b)(2)(B) when the sexual act never occurred is essentially an incorporation of the impossibility defense. Factual impossibility occurs when “the actor’s objective [is] forbidden by the criminal law [and] the actor [is] prevented from reaching that objective due to circumstances unknown to him.”¹³⁴ This seems to be the case in *Root* and *Mitchell*. The defendants’ objectives were to have sex with a minor, which is clearly prohibited by criminal law.¹³⁵ The defendants were prevented from reaching their goals because, unknown to them, the “minors” were actually undercover law enforcement officers.¹³⁶ In addition to the Senate’s explicit rejection of impossibility as a defense to these underlying crimes, it is the “virtually undisputed rule that factual impossibility is not a defense” to liability for attempt crimes.¹³⁷

While the Senate’s rejection of the defense involved liability for attempted violations of the underlying statute and not the Sentencing Guidelines, it demonstrates Congress’ understanding that impossibility cannot serve as a defense for

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 21 AM. JUR. 2D *Criminal Law* § 178 (1998).

¹³⁵ 18 U.S.C. §§ 2422–23 (2003).

¹³⁶ *United States v. Mitchell*, 353 F.3d 552 (7th Cir. 2003); *United States v. Root*, 296 F.3d 1222, 1224 (11th Cir. 2002).

¹³⁷ Rogers, *supra* note 89, at 494 (citing various state and federal courts, the Model Penal Code, and Dressler’s *Understanding Criminal Law*).

attempted sexual abuse of a minor. However, the *Mitchell* court refused to apply the enhancement because the offender was prevented from reaching his objective due to circumstances unknown to him.¹³⁸ In effect, the *Mitchell* court has incorporated a defense all courts and Congress specifically reject.

Congress' rejection of the impossibility defense also demonstrates that the Act was intended to punish culpability, rather than the harm caused to the victim. By specifically accepting the possibility that cyber-predators may be caught in online sting operations by undercover law enforcement officers, Congress has made clear that it is not harm caused that should be punished because there will never be actual harm to a victim in these cases. Rather, it is the wrongful intent of the offender which should be punished. Since section 2A3.2 is the means by which punishment under the Act is imposed, it should consequently be interpreted as focused on offender culpability. Congress intends for offenders to be punished harshly regardless of whether the "victim" is a child or an undercover agent.¹³⁹

D. The Rule of Lenity

Under the rule of lenity, penal statutes should be strictly construed, with ambiguities being resolved in the defendant's favor.¹⁴⁰ However, a strict construction of this guideline does not require a court to interpret subsection 2A3.2(b)(2)(B) as focusing on the victim's behavior because an alternate construction is also reasonable. Construing subsection 2A3.2(b)(2)(B) as focusing on the offender's culpability is a reasonable interpretation of the guideline. Also, a requirement that a court construe a statute strictly does not necessarily mean the court must interpret the statute narrowly.¹⁴¹ Courts should interpret the statute to conform

¹³⁸ *Mitchell*, 353 F.3d at 557.

¹³⁹ 144 CONG. REC. 12,257, 12,263 (1998) (statement of Sen. Leahy).

¹⁴⁰ 73 AM. JUR. 2D *Statutes* § 197 (2001).

¹⁴¹ *In re Banks*, 244 S.E.2d 386, 388 (N.C. 1978) ("[W]hile a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress.").

with legislative intent.¹⁴² The primary purpose of strictly construing statutes is to make sure it is clear what conduct is prohibited, ensuring the defendant has notice.¹⁴³ In this case, the conduct that subsection 2A3.2(b)(2)(B) punishes is the defendant's act of unduly influencing a victim to engage in prohibited sexual conduct. Whether subsection 2A3.2(b)(2)(B) is interpreted as focusing on the victim or the offender, the defendant's prohibited conduct remains the same.

The *Root* court applied subsection 2A3.2(b)(2)(B) correctly, but failed to analyze it thoroughly. Courts should, however, follow the *Root* court's decision and apply subsection 2A3.2(b)(2)(B) when the offender attempts to unduly influence the victim, whether that victim is an actual minor or a law enforcement officer working undercover.

IV. Suggestions for Revisions to Section 2A3.2

As previously explained, section 2A3.2 as it currently exists is ambiguous and imprecise. If section 2A3.2 provided clear definitions and a sentencing philosophy, the courts of appeals could have easily dispensed with these cases. Section 2A3.2, as well as many of the other guidelines, should be revised.

One of the most common complaints about the guidelines is that they "fail[] to express a coherent philosophy of punishment."¹⁴⁴ The purpose of punishing attempts to commit crimes is to prevent the harm that would be caused and to allow law enforcement to catch would-be offenders.¹⁴⁵ Severe punishment for cyber-predators who attempt to unduly influence a minor but cannot succeed because the "victim" is a law enforcement officer primarily serves the purposes of incapacitation¹⁴⁶ and deterrence.¹⁴⁷ Severe punishment for attempt

¹⁴² *Id.*

¹⁴³ *United States v. Kozminski*, 487 U.S. 931, 952 (1988).

¹⁴⁴ Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 20 (2003).

¹⁴⁵ Rogers, *supra* note 89, at 479.

¹⁴⁶ See H.R. REP. NO. 105-557, at 12 (1998), *reprinted in* 1998 U.S.C.C.A.N.

crimes will hopefully prevent cyber-predators from risking their futures.

The following is a proposed revision to the parts of section 2A3.2 discussed in this paper. Language that has been changed or added is underlined and brackets have been placed where language has been omitted completely.

§ 2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

....

(b) Specific Offense Characteristics

(1) If the minor was in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(2) If subsection (b)(1) does not apply; and—

....

(B) a participant otherwise acted to unduly influence[] the victim to engage in prohibited sexual conduct, increase by 2 levels.

Commentary

Application Notes:

1. Definitions. For purposes of this guideline:

“Victim” means (A) an individual who, except as provided in subdivision (B), had not attained the age of 16 years; or (B) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.

“Minor” means an individual who had not attained the age of 18 years.

4. . . .

....

In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of

678, 681 (stating that “[r]ecidivism rates for such offenders are 10 times higher than other types of criminal offenders”).

¹⁴⁷ See 144 CONG. REC. 10,566 (1998) (stating that the Act “sends a message to those individuals who commit these heinous crimes that they will be punished swiftly and severely”) (quoting Rep. Hutchinson).

the case to determine whether a participant's actions to influence [] the victim compromised or would have compromised the voluntariness of the victim's behavior.

....

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor. This presumption only applies where the victim is an actual minor; it does not apply where the victim is an undercover law enforcement officer.

Sentences imposed under this guideline are intended to prevent harm to children and to deter and incapacitate those who pose a danger to children. In interpreting any provision of this guideline, a court should be mindful of this purpose.

These changes help resolve the ambiguities in section 2A3.2. By using "minor" in some provisions and "victim" in others and including definitions of both words, it is clear which provisions are supposed to apply when the "victim" is an undercover law enforcement officer and which provisions require an actual minor. This will prevent courts from having to analyze each provision to decide if it can apply when the "victim" is an undercover law enforcement officer.

These changes also make clear that the undue influence provision is focused on the offender's behavior, not the effect that behavior has on the victim. By specifying that the enhancement applies when the offender "acted to unduly influence" the victim, the question of whether the enhancement is defendant-focused or victim-focused is eliminated. The provision is explicitly defendant focused.

This proposal also provides instructions for courts on how to apply this provision when the "victim" is a law enforcement officer. The court should look at whether the offender's behavior

would have unduly influenced a child.¹⁴⁸

While this proposal addresses many of the ambiguities in section 2A3.2, it recognizes that it is impossible to anticipate every problem that may arise in the interpretation of a statute. The inclusion of a statement of the purpose of the punishment will give judges more guidance when terms are unclear and help them interpret the guideline as intended. This will reduce costly and time-consuming litigation.

V. Conclusion

The Seventh and Eleventh Circuits' conflicting interpretations of subsection 2A3.2(b)(2)(B) demonstrate that the guideline is ambiguous as to which "victims" can be law enforcement officers. This problem stems in part from the Sentencing Commission's failure to adopt a sentencing philosophy for judges to consider when interpreting vague or ambiguous guidelines. Looking to context and legislative intent, however, can help correct some of these problems. The context of subsection 2A3.2(b)(2)(B) and the legislative history of section 2A3.2 demonstrate that the Sentencing Commission and Congress intended for this enhancement to apply when the "victim" is an undercover law enforcement officer.

For Kacie Woody, the Act and sentencing guideline were of little help. However, encouraging law enforcement to conduct online sting operations to catch cyber-predators can have a real impact in preventing similar events in the future. This encouragement stems from law enforcement's knowledge that their investigative efforts are rewarded with increased sentencing punishments for violators. Were it not for the officers in the *Root* and *Mitchell* cases, Root and Mitchell may have caused severe and long-lasting harm to children. When the punishment received by these offenders is greater, law enforcement has greater incentive to conduct such sting operations. Thus, digital deception by law enforcement, combined with severe punishment of cyber-

¹⁴⁸ The *Root* court did this when it applied subsection 2A3.2(b)(2)(B). It found that Root used increased knowledge, persuasive powers, and superior resources in his attempt to influence the "victim."

predators, helps to provide greater protection for children.